

1968

Lakeshore Motor Coach Lines, Inc., Wasatch Motors, Inc., Metro Transportation, Inc., Ogden Bus Lines v. Salt Lake Transportation Company, Public Service Commission Of Utah, Donald Hacking, Hal S. Bennett And Donald T. Adams : Brief of Plaintiffs Continental Bus System, Inc., Et Al.

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IN THE SUPREME COURT OF THE STATE OF UTAH

LAKE SHORE MOTOR COACH LINES, INC.,
WASATCH MOTORS, INC., et al.,

Plaintiffs,

v.

SALT LAKE TRANSPORTATION COMPANY
and PUBLIC SERVICE COMMISSION OF
UTAH, et al.,

Defendants.

Case No. 10904

LEWIS BROS. STAGES, INC., a corporation,
and BINGHAM STAGE LINES, a corporation,

Plaintiffs,

v.

PUBLIC SERVICE COMMISSION OF UTAH,
et al., and SALT LAKE TRANSPORTATION
COMPANY,

Defendants.

Case No. 10907

CONTINENTAL BUS SYSTEM, INC., et al.,

Plaintiffs,

v.

PUBLIC SERVICE COMMISSION OF UTAH,
et al., and SALT LAKE TRANSPORTATION
COMPANY,

Defendants.

Case No. 10908

BRIEF OF PLAINTIFFS
CONTINENTAL BUS SYSTEM, INC., et al.,

APPEAL FROM AN ORDER OF THE
PUBLIC SERVICE COMMISSION OF UTAH

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v.		
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LEWIS BROS. STAGES, INC., a corporation, and BINGHAM STAGE LINES, a corporation,	<i>Plaintiffs,</i>	
v.		} Case No. 10908
PUBLIC SERVICE COMMISSION OF UTAH, et al., and SALT LAKE TRANSPORTATION COMPANY,	<i>Defendants.</i>	
CONTINENTAL BUS SYSTEM, INC., et al.,	<i>Plaintiffs,</i>	} Case No. 10908
v.		
PUBLIC SERVICE COMMISSION OF UTAH, et al., and SALT LAKE TRANSPORTATION COMPANY,	<i>Defendants.</i>	

BRIEF OF PLAINTIFFS CONTINENTAL BUS SYSTEM, INC., et al., STATEMENT OF THE KIND OF CASE

This is an appeal from an Order of the Public Service Commission of the State of Utah which granted defendant, Salt Lake Transportation Company, a certificate of convenience and necessity to operate as a common motor carrier by motor vehicle for the transportation of passengers and their baggage in the same or separate vehicles, in charter operations, and in special operations in sight-seeing or passenger tours; between all points and

places within a 26 mile radius of Salt Lake City and within said area to all points and places therein, and return, over predetermined routes and/or irregular routes, excluding traffic originating or terminating at Provo, Utah.

DISPOSITION OF THE CASE

The Public Service Commission granted defendant, Salt Lake Transportation Company, the authority sought and issued Certificate of Convenience and Necessity No. 538-Sub. 5.

Petition for Rehearing and Reconsideration was filed by this plaintiff in a timely manner and rehearing was denied by the Public Service Commission.

These actions of the Commission have been appealed directly to this Court.

RELIEF SOUGHT ON APPEAL

This appeal seeks to have the lawfulness of the original Order and Order on Rehearing of the Commission inquired into, determined, annulled and set aside.

PRELIMINARY MATTERS

We will refer to the plaintiffs, Continental Bus System, Inc., American Bus Lines, Inc., Denver-Salt Lake-Pacific Stages collectively as "Continental"; defendant, Public Service Commission of Utah, as "Commission"; and defendant, Salt Lake Transportation Company, as "Salt Lake Transportation."

With few exceptions we shall set forth only the facts as they directly pertain to Continental's case, recognizing that other plaintiffs, viz: Lake Shore Motor Coach Lines, et al., Lewis Brothers Stages, Inc., et al., are parties to this proceeding and will be filing separate Briefs.

We do urge that the case must be considered on the entire Record and although we do not cite separately the facts or issues of other parties, we nevertheless incorporate their statements and arguments herein by reference and assert reliance upon them in part for the setting aside of the Commission's Order in this case.

STATEMENT OF FACTS

In November of 1965 Salt Lake Transportation filed an Application for a Certificate of Convenience and Necessity before the Commission. It sought authority to operate as a common motor carrier of passengers and baggage in intrastate commerce and attached to its Application a "Statement of Financial Condition" and a schedule of its equipment (R. 600-604). It proposed to operate as a common carrier for passengers and their baggage in the same or separate vehicles, in special operations, in sight-seeing or pleasure tours, between all points and places in Davis, Morgan, Salt Lake, Utah, Tooele, Summit, and Wasatch Counties; and from said counties to all points and places in the State of Utah, and return, over predetermined routes and/or irregular routes and operate under the name of Salt Lake Transportation or Gray Line Motor Tours.

At the time of hearing, it amended its application restrictively, so as to provide that the services referred to would be performed between all points and places within a 26 mile radius of the city limits of Salt Lake City, Utah and from said radial area to all points and places in the State of Utah and return over predetermined routes and/or irregular routes and that the 26 miles would be calculated on an air line basis (R. 25-26).

Continental, along with other common carriers, protested the Application.

Continental is a common carrier doing business in both interstate and intrastate commerce and operates in the State of Utah. The Commission took notice of Continental's operating authority (R. 507) which is defined in the Order (R. 622). Continental holds authority to operate charter round trips originating on U. S. Highway 91 in Salt Lake City south and between Provo and the Deer Creek Damsite, which is located between Provo and Heber City. It can also operate round trip charter service from Salt Lake City on U. S. Highway 40 west to the Utah-Nevada line and from the Utah-Wyoming state line on the north to the Utah-Arizona state line or the south from U. S. Highway 91. It is further authorized to conduct round trip charter trips from U. S. Highway 40 between Salt Lake City and the Utah-Colo-rado state line or as an alternate route from U. S. Highway 91 between Salt Lake City and Provo and from U. S. Highway 189 between Provo and Heber City or from U. S. Highway 52 from Orem to the junction of U. S.

Highway 189 and from Heber to the Utah-Colorado state line over U. S. Highway 40. It generally holds the authority to serve charter round trips originating on all routes served in its regular common carrier operation, restricted only against transportation service for tours on any regular schedule or regular route and trips wholly within municipal corporate limits served by urban transportation companies (R. 622-623).

A number of witnesses appeared on behalf of Salt Lake Transportation, which fall into three general classifications. Those who are affiliated officially with a public or community body; those with private business interests; and officials of Salt Lake Transportation.

Within the first group were: H. Devereaux Jennings — Assistant Director of the State Tourist and Publicity (R. 31); Lowe Ashton — President, Wasatch Chamber of Commerce (R. 70); Rulon Doman — Scout Executive Emeritus, Boy Scouts of America (R. 88); Andrew R. Hurley — City Attorney for Park City (R. 120); Murray M. Moler — Chairman, Utah Travel Council (R. 162); F. C. Koziol — Director of the Utah Park and Recreation Commission (R. 173); Henry Cameron — President, Granger-Hunter Chamber of Commerce (R. 187-188); Frank C. Burns — President, Kearns Lions Club (R. 192); Ted Covington — Member of Board of Directors, Kearns Chamber of Commerce (R. 290); Ira Beesley — Member of Board of Directors, Davis County Chamber of Commerce (R. 297); Reid D. Pace — Summit County Clerk, Hoytsville, Utah (R. 308). —

These witnesses generally testified they would favor the additional tour and charter service offered by Salt Lake Transportation, but the witnesses, without exception, testified they were not aware of deficiencies in existing transportation service and that they had not been refused charter transportation service. Jennings (R. 55); Ashton (R. 86-87); Doman (R. 102); Hurlburt (R. 151, 153); Moler (R. 169); Koziol (R. 185, 186); Cameron (R. 189); Burns (R. 198-199); Covington (R. 296); Beesley (R. 306); Pace (R. 315, 316, 317).

The second group were persons who own and operate businesses in the ski resort areas. They testified for Salt Lake Transportation to be able to transport people principally skiers, between Alta, Brighton, Park City and Wasatch State Park. These witnesses also said they were not aware of deficiencies in existing carriers' charter service. None of them had ever called Continental or been refused Continental's services. Gertrude Howard — Owner-operator Mount Majestic Manor at Brighton (R. 241); Lee Bronson — Owner-manager Rustler Lodge at Alta (R. 324, 328).

Mr. Charles A. Boynton, Jr., President and General Manager of the Salt Lake Transportation, testified as to the Company's equipment and that Salt Lake Transportation presently held certain charter authority. Exhibit 5 (R. 528) contains this authority and limits the point of origin of Salt Lake Transportation in this respect to Salt Lake City (R. 250) although Salt Lake Transportation has considered the Salt Lake City origin point to encompass the greater Salt Lake area (R. 251).

Salt Lake Transportation did not present an income statement (R. 274) and its President said his Company wanted to compete with Continental's charter service rights (R. 276).

Salt Lake Transportation currently operates an airport limousine service, a rent-a-car service, and Gray Line Sight-seeing tours and the same equipment used for these operations would be utilized in its proposed charter service (R. 287).

Concerning equipment, its witnesses testified that for presently authorized operations it has been necessary for the company to secure equipment from other carriers and at the present time the company has found it more economical to borrow additional buses from other carriers than to maintain its own (R. 332). During the skiing season the company operates sometimes 25 to 30 vehicles on Saturday mornings in January and it obtains as many as 15 or 20 buses from Lewis Bros. Lines (R. 333). The last equipment purchased outright for charter service by Salt Lake Transportation preceded the hearing by some fifteen months (R. 334).

Continental's evidence was introduced through Exhibits 40 through 54 (R. 584-599c) and shows the Company's income statements, operating ratios, and bus miles operated, revenues derived in Utah, and equipment and buses licensed in Utah. Exhibit 51 (R. 596) shows Continental's Utah investment to be \$3,794,230.07 as of December 31, 1965 (R. 596) with a \$525,480.43 payroll in Utah for the year 1965 (R. 597).

Testimony and evidence showed Continental had not turned down anyone desiring charter service and had equipment available for this service at all times (R. 504).

Continental maintains and bases approximately 25 buses in Utah (R. 510) and derived \$8,327 in revenues for its charter service in Utah in 1965 (R. 513, 599).

Tour and charter service revenues are set forth in the Special Bus Revenue classification of the Company's Exhibits (R. 584-599). The classification also contains revenues derived from the interstate aspects of Continental's operations (R. 514).

The Record was closed June 21, 1966 and on January 20, 1967 the Commission issued its Report and Order substantially granting the authority sought by Salt Lake Transportation (R. 618-626) and as amended in its Order issued April 6, 1967 (R. 645-647).

ARGUMENT

POINT I

THE COMMISSION FAILED TO MAKE ESSENTIAL FINDINGS.

We recognize as we begin this argument that the provisions of Utah Code Ann. 1953, Sec. 54-7-16 require ". . . The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review. Such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination."

It is mandatory, however, that the Commission make findings on the essential elements of the case, and if such findings are not made, obviously a Commission Order is unreasonable, arbitrary, capricious and unlawful and must be set aside.

The facts to be established in a certificate proceeding in the State of Utah are well defined and have been recognized for a substantial period of time.

In *Mulcahy v. Public Service Commission*, 101 Utah 245, 117 P.2d 298 (1941), this Court stated as follows:

“While evidence pertinent to any question involved in the application may be presented on the hearing, the commission’s determinations would proceed as follows:

“Does the public convenience and necessity require further, new or additional common carrier service in the territory proposed to be served? If not, the application should be denied. If such service is required, should the applicant be permitted to render it? In determining the answer to this question the commission shall consider the following matters: (1) Is the applicant financially able to perform the service? If not, his application must be denied. (2) Will the operations proposed unduly injure the highway over which the operations must be carried on, or unduly interfere with the use of the same by the traveling public? If either phase of this question be answered in the affirmative the application should be denied. (3) Although beneficial to the territory to be served, would the service proposed be detrimental to the people of the states as a whole? If so, the application should be denied. (4) Having found now that the convenience and

necessity of the public in the territory proposed to be served, require additional service; that such service will not be detrimental to the people of the state as a whole; that applicant is financially able to render the service; that the service will not unduly injure the highway or unduly interfere with the public traveling thereon, the question is: Should such new service be rendered by existing carriers or by the new applicant? This question poses for the commission, not the finding of a factual answer, but the determination of a matter of policy. Which in the opinion of the commission will best subserve the public convenience, necessity and welfare? And in determining this matter the commission under the statute may and should take into consideration the existing transportation facilities, their investment, the taxes they pay, the services they have rendered and are now rendering; the need of a continuation of such services; the effect upon such services of a new obligation to serve; the effect upon such services of a new competitor in the transportation field; the effect of a new competitor or carrier upon the economic, industrial, social and intellectual life of the territory, and other matters which may affect the public welfare, and the growth and development of the life in, and resources of the state. That existing carriers engaged in transportation to and from a certain field or territory, rendering the service it is permitted or ordered to do, reasonably, adequately and efficiently, is not lightly or ruthlessly to be interfered with, or subjected to needless competition, is evident from the provisions of the statute Section 5 of Chapter 65, Laws of Utah 1935, after vesting in the commission the power to regulate and supervise all common motor carriers reads: “ * * * to regulate the facilities, accounts, service and safety of operation of each such common motor carrier, to regula-

operating and time schedules so as to meet the needs of any community, and so as to insure adequate transportation service to the territory traversed by such common motor carriers, and so as to prevent unnecessary duplication of service between these common motor carriers, and between them and the lines of competing steam and electric railroads; and the commisison may require the coordination of the service and schedules of competing common carriers by motor vehicles or electric and steam railroads * * *.'

"An applicant desiring to enter a new territory, or to enlarge the nature or type of the service he is permitted to render must therefore show that from the standpoint of public convenience and necessity there is a need for such service; that the existing service is not adequate and convenient, and that his operation would eliminate such inadequacy and inconvenience. He must also show that the public welfare would be better subserved if he rendered the service than if the existing carrier were permitted to do so. The paramount consideration is the benefit to the public, the promotion and advancement of its growth and welfare. Yet the interests of the existing certificate holder should be protected so far as that can be done without injury to the public, either to its present welfare or hindering its future growth, development, and advancement. *Corporation Comm. v. Pacific Greyhound Lines*, 54 Ariz. 159, 94 P.2d 443; *Chicago R.R. Co. v. Commerce Comm.*, 336 Ill. 51, 167 N.E. 840. Having given due consideration to those matters the commission determines whether the existing carriers or a new one should be permitted to render the proposed service. If the commission's determination finds justification in the evidence, it is not a law ques-

tion and we cannot review or modify it or set it aside. Regardless of what our own views on the matters may be, the determination of the commission on this matter finds support or justification in the evidence. We cannot say it acted arbitrarily or capriciously, and the finding thereon must stand."

Findings as to essential elements in this case, however, are nonexistent.

In Finding No. 1 (R. 619), the Commission sets forth the fact that Salt Lake Transportation presently holds certain certificates and the scope of its present authority.

In Finding No. 2 (R. 619), the Commission merely states the authority Salt Lake Transportation requested through its Application.

In Finding No. 3, the Commission Orders state: "It (Salt Lake Transportation) has more than adequate equipment and facilities to conduct the proposed operation and is financially capable of doing so."

This is an ultimate finding, if anything, and contrary to the Record before the Commission which discloses that Salt Lake Transportation had no intention of placing into evidence even its financial statement (R. 274). And with respect to equipment, the Record is again undisputed that Salt Lake Transportation presently may lease equipment from other carriers and that it intends to borrow or lease equipment if it were authorized to proceed under this Application (R. 331-334).

Obviously the Commission, based upon this testimony, could not make an adequate finding that it has "more" than adequate equipment and facilities to conduct the proposed operation. It cannot tell us, for example, whether the cost of equipment will make the service infeasible because there is no finding as to cost. It cannot tell us whether equipment for the service can be or is to be leased and its cost. For present operations Salt Lake Transportation must borrow equipment and so on what factual basis can this company have "more" than adequate equipment? The Commission does not tell us. It has not made the necessary finding.

Finding No. 4 merely reviews the sight-seeing and tour operations as conducted by Salt Lake Transportation in the past and adds nothing to essential findings required (R. 620).

Finding No. 5 purports to find that "There has been a substantial population and economic growth in the origin counties of the Application" (R. 620). And that "There appears a need for transportation service which can originate at a point other than Salt Lake City in the origin counties of the Application and to serve to and from various points in Utah.

This purported finding in like manner refers to alleged needs which are undefined. This is an ultimate finding or a conclusion not a finding as must be made by a fact finding body so that a reviewing body can determine whether authority has been exceeded. But there are no facts upon which such a finding could be

based. The Record discloses that Continental, as well as other common carriers, can and are performing charter service at the present time and very extensively through the areas in question.

Continental's authority, as has been pointed out, extends from U. S. Highway designations in the 26 mile area in which Salt Lake Transportation seeks its authority (R. 507).

Other carriers' evidence was also impressive in this respect. This testimony traces routes in great detail through certain areas and shows the extensive geography covered by these carriers. Mr. Joseph M. Lewis for plaintiff, Lewis Bros. Stages, testified as to certain of the Lewis Bros.' routes over which that Company and its affiliates are allowed to extend round trip charter service (R. 443-444), from which the Commission is bound to find, along with the other evidence in the Record that present carriers' charter and tour ability substantially blanket the area now sought to be certified to Salt Lake Transportation. But the element with respect to the lack of need will be developed later. It is suffice to say here there are no facts set forth in the findings from which the Commission's conclusion of "need," as set forth in Finding No. 5 (R. 621) can be predicated.

Findings 6 through 14 describe the various protestants before the Commission and their operating authorities and Finding No. 15 in conclusion form states:

“Because of the limitations of the authority of existing carriers it is apparent that they cannot meet the requirements for service outlined by the supporting witnesses and proposed by the applicant, for which the Commission finds a public need.

* * * * *

It appears to the Commission that the grant of authority as applied for in the Application would not unduly affect existing carriers adversely and will not burden the highways, and will serve the best public interest and be responsive to a public need.” (R. 624)

These could only be argued to be ultimate findings at best and, in fact, represent conclusions, not findings at all.

The foregoing is all we have from the Commission on its purported findings of public convenience and necessity. The Commission has fallen far short of its statutory duty and has failed and refused to make findings. In no way can we locate findings as to the essential elements of this case as dictated by authorities outlined above.

The Commission is an administrative agency created by Statutes of the State of Utah, Utah Code Ann. 1953, Sec. 54-1-1 - 54-7-30 and although it engages in quasi-judicial functions, it is basically a fact finding body.

It is an elementary rule of law that administrative agencies must make full and complete findings of fact upon which to rest their decisions. As the cases which we will cite disclose, adequate findings of fact are an absolute necessity. The basic reason for this requirement is to enable reviewing courts to determine readily whether

the administrative body has properly pursued its authority, confined its inquiry to its statutory limitations, and correctly applied the law to the facts. Another very practical reason is to aid the party litigants in framing, and the Court in deciding, the issues on appeal. The decision of the Commission completely violates this elementary principle of administrative law.

In Volume 2, Davis, Administrative Law Treatise, at page 444, Section 16.05, the following is stated with respect to the requirement that administrative agencies must make full and complete findings of fact upon disputed issues:

“The practical reasons for requiring administrative findings are so powerful that the requirement has been imposed with remarkable uniformity by virtually all federal and state courts, irrespective of a statutory requirement. The reasons have to do with facilitating judicial review, avoiding judicial usurpation of administrative functions, assuring more careful administrative consideration, helping parties plan their cases for rehearings and judicial review, and keeping agencies within their jurisdiction.

“Much the most prominent reason discussed in judicial opinions, and the reason which is clearly dominant in judicial motivation, is the facilitation of judicial review. A simple illustration will readily show the need for findings as an aid to judicial review. A statute provided that no milk license should be granted unless the commissioner ‘is statisfied that the applicant is qualified by character, experience, financial responsibility and equipment to properly conduct the proposed business, that the issuance of the license

will not tend to a destructive competition in a market already adequately served, and that issuance of the license is in the public interest.' For the court to review a bulky record without knowing which of the six factors the commissioner found to be lacking would obviously be wasteful. Hardly surprising was the court's holding that 'Only after the commissioner has made findings of fact can the court decide whether the findings are sustained by the evidence. . . .' When issues are more complex and interdependent, the need for findings is even greater.

"The language of Mr. Justice Cardozo, in a case in which the Court could do no more than get an impression that the Commission may have acted properly, is often quoted: 'The difficulty is that it has not said so with the simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency. . . . We must know what a decision means before the duty becomes ours to say whether it is right or wrong.' Mr. Justice Frankfurter has explained that the requirement 'is merely part of the need for courts to know what it is that the Commission has really determined in order that they may know what to review. . . . This is the real ground for the decisions which have found Interstate Commerce Commission orders wanting in necessary findings.' If there were no law requiring findings, judges struggling with masses of evidence and hazy findings, trying their best to discover whether the agency has applied the proper principles, would surely invent such a requirement. Characteristic judicial remarks seem to manifest considerable patience:

‘We only require that, whatever result be reached enough be put of record to enable us to perform the limited task which is ours.’ ”

The Supreme Court of the United States in the case of *Colorado-Wyoming Gas Company v. Federal Power Commission, et al.*, 324 U.S. 626, 89 L. ed 1235, was confronted with a similar situation. In that case an essential finding of fact upon which the Federal Power Commission decision was based related to the quantity of natural gas actually sold by the public utility at a certain time, and the effect the sale had upon an allocation of costs. The Staff of the Federal Power Commission had used one method of making the determination and the Commission another. The findings, however, were not sufficient to disclose to the reviewing court which method was the basis of decision, or why it was preferred. In other words, the reviewing court was presented with the dilemma of determining whether there was substantial evidence to support FPC’s ultimate finding, but was not provided with anything which showed the various factors and figures taken into consideration which were adopted by the Commission in arriving at its ultimate conclusion. In respect thereto, the court stated the following, commencing at page 633, U.S.:

“We do not know why the lower figure was rejected. There are no findings to guide us. In the record there is testimony which may suffice as a partial reconciling of the difference and which casts some doubts on the accuracy of the lower figure. But we have been unable completely to reconcile the difference. . . .

“The review which Congress has provided for these rate orders is limited. Section 19(b) 15 USCA § 717 r (b), 4 FCA title 15, § 717 r (b) says that the ‘finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.’ But we must first know what the ‘finding’ is before we can give it that conclusive weight. We have repeatedly emphasized the need for clarity and completeness in the basic or essential findings on which administrative orders rest, *Florida v. United States*, 282 U.S. 194, 215, 75 L. ed 291, 304, 51 S. Ct. 119; *United States v. Baltimore & O. R. Co.*, 293 U. S. 454, 464, 79 L. ed 587, 594, 55 S. Ct. 268; *United States v. Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499, 504, 505, 510, 511, 79 L. ed 1023, 1028, 1029, 1031, 1032, 55 S. Ct. 462; *United States v. Carolina Freight Carriers Corp.*, 315 U. S. 475, 488, 489, 86 L. ed 971, 982, 62 S. Ct. 722. Their absence can only clog the administrative function and add to the delays in rate making. We cannot dispense with them for Congress has provided the standards for judicial review under this Act. § 19(b). The courts cannot perform the function which Congress assigned to them in absence of adequate findings. Nor are they authorized under § 19(b) to make findings and substitute them for those of the Commission.”

A similar statement is contained in *United States v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 294 U. S. 499, 79 L. ed 1023, at page 510, U. S., where the following appears:

“We would not be understood as saying that there do not lurk in this report phrases or sentences suggestive of a different meaning. One gains at places the impression that the Commission looked upon the proposed reduction as some-

thing more than a disruptive tendency; that it found unfairness in the old relation of parity between Brazil and Springfield; and that the new schedule in its judgment would confirm Milwaukee in the enjoyment of an undue proportion of the traffic. The difficulty is that it has not said so with the simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi-judicial findings of an administrative agency. *Beaumont, S.L. & W.R. Co. v. United States*, 282 U.S. 74, 86, 75 L. ed. 221, 229, 51 S. Ct. 1; *Florida v. United States*, 282 U.S. 194, 215 75 L. ed. 291, 304, 51 S. Ct. 119. We must know what a decision means before the duty becomes ours to say whether it is right or wrong."

That case involved railroad rates. The I.C.C. adjusted various rates but did not set forth sufficient findings to indicate why it had done so, what the impact would have been if the current situation had been allowed to remain, etc. Only general conclusions were stated by the Commission to justify its action, so the court held that generalizations to the effect that a change in rates was necessary was not sufficient without further findings.

In *Sagniaaw Broadcasting Company v. Federal Communications Commission*, 96 F. 2d 554, the Court of Appeals for the District of Columbia handed down an exhaustive review of the reasons for requiring full and complete findings, and a concise outline of just what those findings should contain and upon what subjects they should be made. That case involved conflicting

applications for a certificate to construct a radio station, in which public convenience and necessity had been found in favor of one applicant and against the other applicant. The court stated at page 559 the following:

“The requirement that courts, and commissions acting in a quasi-judicial capacity, shall make findings of fact, is a means provided by Congress for guaranteeing that cases shall be decided according to the evidence and the law, rather than arbitrarily or from extralegal considerations; and findings of fact serve the additional purpose, where provisions for review are made, of apprising the parties and the reviewing tribunal of the factual basis of the action of the court or commission, so that the parties and the reviewing tribunal may determine whether the case has been decided upon the evidence and the law or, on the contrary, upon arbitrary or extralegal considerations. When a decision is accompanied by findings of fact, the reviewing court can decide whether the decision reached by the court or commission follows as a matter of law from the facts stated as its basis, and also whether the facts so stated have any substantial support in the evidence. In the absence of findings of fact the reviewing tribunal can determine neither of these things. The requirement of findings is thus far from a technicality. On the contrary, it is to insure against Star Chamber methods, to make certain that justice shall be administered according to facts and law. This is fully as important in respect of commissions as it is in respect of courts.

“In discussing the necessary content of findings of fact, it will be helpful to spell out the process which a commission properly follows in reaching a decision. The process necessarily includes at least four parts: (1) evidence must be

taken and weighed, both as to its accuracy and credibility; (2) from attentive consideration of this evidence a determination of facts of a basic or underlying nature must be reached; (3) from these basic facts the ultimate facts, usually in the language of the statute, are to be inferred, or not, as the case may be; (4) from this finding the decision will follow by the application of the statutory criterion. For example, before the Communications Commission may grant a construction permit it must, under the statute, be convinced that the public interest, convenience, or necessity will be served. An affirmative or negative finding on this topic would be a finding of ultimate fact."

Commencing again at page 561 appears the following:

"These decisions show that a reviewing court cannot properly exercise its function upon findings of ultimate fact alone, but must require also findings of the *basic* facts which represent the determination of the administrative body as to the meaning of the evidence, and from which the ultimate facts flow. Such findings are, we think, just as necessary in cases involving the application of the statutory criterion of public convenience, interest, or necessity set up by the Communications Act, as in those cases which under the Interstate Commerce Act require the application of the standard of unjust discrimination, or in those cases which under state public utility statutes require the application of the criterion of public convenience and necessity." (Emphasis supplied)

And again at page 562:

"As to financial qualifications, the appellant urges as error the Commission's finding that 'both applicants are possessed of the requisite .

financial qualifications.' The question of financial qualification has at least two aspects: first, has the applicant enough resources to construct the station and to operate it for a brief period of time; and second, is there a reasonable likelihood of financial profit to be expected from the operation of the station, or are the applicant's personal resources such that he is able and willing to operate a station for a considerable period of time at a loss. The Commission's finding that the intervenors are financially qualified is an inference rather than a finding of fact, and does not disclose any facts bearing on either of the above aspects of the question of financial qualifications. *Heitmeyer v. Federal Communications Commission*, *supra*. The Commission did make findings as to the present resources of the intervenors, which we think are adequately supported by the record. The appellant urges, however, that the Commission erred in failing to find that a station operated as proposed by the intervenors would not receive sufficient commercial support to justify its operation. As to the likelihood of such commercial support the Commission said only that 'It is anticipated that the monthly income expected to be derived from the station's operation would approximate \$5,500.' This statement can hardly be characterized as a finding as to the commercial support which the intervenors' station might fairly expect. It is not even coupled with a statement as to the monthly expenses of the proposed station from which by inference the conclusion could be drawn that the station would have a reasonable likelihood of operating at a profit. Even though there may be evidence in the record — upon this we do not pass — from which the Commission might have concluded that the intervenors would receive adequate commer-

cial support in the sense above stated, this does not excuse the Commission from its duty of making a finding as the result of its consideration of that evidence. The language of Mr. Justice Butler in *Atchison, T. & S. F. Ry. Co. v. United States*, 295 U.S. 193, 55 S. Ct. 748, 79 L. ed. 1382, that:

“‘This court will not search the record to ascertain whether, by use of what there may be found, general and ambiguous statements in the report intended to serve as findings may by construction be given a meaning sufficiently definite and certain to constitute a valid basis for the order. In the absence of a finding of essential basic facts, the order cannot be sustained.’” 295 U. S. 193, at pages 201, 202, 55 S. Ct. 748 at page 752, 79 L. ed. 1382.

seems pertinent. It is not the duty of the court to make findings for the Commission and when the Commission has failed in its duty to make such findings, it is impossible for the court to review its conclusion. This too we regard as reversible error.”

The above case holds that a finding of public convenience and necessity is an ultimate finding only, which must be supported by primary findings of the facts which constitute public convenience and necessity. In addition, such findings as that “. . . there appears a need for a transportation service which can originate at a point other than Salt Lake City . . .” is not sufficient when Salt Lake City is not a “point”; when its many streets and highways are not referred to in the context of the hearing and when the existing service points of other car-

riers are not referred to at all. In such event, individual findings must be made upon precise locations and express needs and express deficiencies of existing carrier services.

In contrast to the requirements set forth by the Court of Appeals in the *Saginaw* case, such purported finding in the Commission decision at (R. 621) is at best an ultimate finding. How much transportation is required, by whom is it required, from where to where is it required. We are dealing here with a 26 mile area which includes the most heavily concentrated population and streets and highways in the State of Utah and yet the Commission is unable to specify any locations, any points, anything whatever upon which a finding as to need could be based.

The case of *Johnston Broadcasting Co. v. Federal Communications Commission*, 175 F. 2d 351, involved competitive permits, one requesting authority to construct a new station and the other requesting authority to change frequency in an existing station. This case also contained an excellent discussion of the various findings of fact which must be made by an administrative body in arriving at its ultimate decision. Commencing at page 356, the court stated:

“The principles which govern the interplay of administrative and judicial functions in a comparative consideration are basically the same as those which govern in the determination of the qualification of a single applicant. The Commission has wide powers and discretion, but upon

appeal the courts must determine whether its action was within its statutory authority and applicable constitutional limitations, and the findings, conclusions and decision must be such that the courts can exercise that jurisdiction. But the essentials to legally valid conclusions differ, as the two problems, one of bare qualification and the other of comparative qualifications, differ. In respect to comparative decisions, these are the essentials: (1) The bases or reasons for the final conclusion must be clearly stated. (2) The conclusion must be a rational result from the findings of ultimate facts, and those findings must be sufficient in number and substance to support the conclusion. (3) The ultimate facts as found must appear as rational inferences from the findings of the basic facts. (4) The findings of the basic facts must be supported by substantial evidence. (5) Findings must be made in respect to every difference, except those which are frivolous or wholly unsubstantial, between the applicants indicated by the evidence and advanced by one of the parties as effective. (6) The final conclusion must be upon a composite consideration of the findings as to the several differences, pro and con each applicant.

“The first four of these essentials are established requisites of Commission decisions. The progress to a valid conclusion, as long-since established by the cases, is: to receive the evidence; then to make from the evidence findings of basic facts; then to make, by inference from the basic facts, findings of the ultimate facts which are requisite to decision; then to draw a final conclusion by the application of the statutory criterion to the ultimate facts. The last two essentials above stated — (5) and (6) — are made necessary by the

peculiar characteristics of a comparative determination. The Commission cannot ignore a material difference between two applicants and make findings in respect to selected characteristics only. Neither can it base its conclusion upon a selection from among its findings of differences and ignore all other findings. It must take into account all the characteristics which indicate differences, and reach an over-all relative determination upon an evaluation of all factors, conflicting in many cases. * * *

It is to be observed from the *Johnston* case that a commission cannot ignore material differences in disputed questions of fact as it did in the instant case, nor can it base its ultimate conclusion on such selected findings of fact as it may elect to make. Findings must be made on every disputed question of fact which is pertinent to the ultimate finding of public convenience and necessity and here the present service offered by existing certificated carriers was completely ignored and the evidence disregarded.

While the above decisions relating to administrative agencies go into considerable detail as to the nature and extent of findings which must be made, this Court in its considerations of administrative matters has basically arrived at the same conclusions.

In *Aetna Life Ins. Co. et al. v. Industrial Commission*, 64 Utah 415, 231 P. 442 (1924) the court annulled an award by the Industrial Commission stating that there was not substantial evidence for the findings that the

accident occurred while plaintiff's insurance was in effect. In doing so, the court said at page 444 of the Pacific Reporter:

"A finding of a material fact cannot sustain an award, unless the finding is supported by substantial evidence. The evidence need not be direct or positive; it may be by circumstances or other facts from which the fact found may be inferred. But in the latter case the inference must be a legitimate one. There must be a reasonable theory which leads to the conclusion reached. A finding cannot be predicated upon mere surmise or conjecture. . . .

"This court is reluctant to set aside a finding of fact made by the Industrial Commission. It will not do so if the finding is fairly supported by legal evidence. There are supposable cases involving the question here presented where the evidence would reasonably support a finding either way on the question of proximate cause and the finding be sustained, but this is not such a case.

"For the reason that the findings and conclusions of the Industrial Commission complained of are not supported by substantial evidence. The award as against the plaintiff is annulled."

In considering whether the Commission had failed to make findings of fact on material matters this Court considered in some depth the findings made by the Commission in *Utah Light and Traction Co. v. Public Service Commission*, 101 Utah 99, 118 P.2d 683 (1941).

The Commission elaborates at Page 686 of Pacific Reporter concerning the findings made in that case.

“The Commission expressly found that the Traction Company ‘operates a bus service southward on State Street serving Murray, Midvale, and Sandy, on a schedule of 22½ minutes during peak periods, and 45 minutes at other times’ and that the ‘Salt Lake and Utah R. R. Corporation operates in the territory adjacent to Redwood Road (through the west side of Salt Lake Valley) with five trains north into Salt Lake City and five trains south each day.’ Of course the Commission need not descend to such details as to find the number of people riding each bus or train daily. The Commission did find that the new service would stimulate the use of public carriers rather than private cars and that such service as the Airways would give would meet the demands of the public more adequately. It found that the territory above set forth as without bus service is in need of bus service both intercommunity, and into Salt Lake City, such as Airways offers it. It found that this new service was in the public welfare; that it would tend to develop new homes and new enterprises in the territory beyond Salt Lake City limits, and that general development of that area would be promoted and stimulated by the new service. Such are proper matters for the Commission to consider. *Mulcahy v. Public Service Commission*, Utah, 117 P.2d 298 (not yet reported [in State Reports]). It found that the part of the territory to be served by the Airways is new territory being pioneered; and that the roads are not overburdened with traffic, and the new service will not interfere with the use of the roads by the general public. It found that new service is needed, at least to the extent set forth in the application, and therefore to that extent the service now rendered is inadequate. It found that the Airways permit will not substantially detract

from, nor impair existing common carrier service; that it will not be detrimental to the people of the State of Utah or the localities to be served. These findings are not set forth in the detail and particularity used by courts of law whose judgments determine ultimate rights of life and property title, nor need they be so definite nor orderly. These determinations of the Commission involve questions of license, or privilege between the sovereign people and the individual who seeks to obtain or enjoy such rights or privilege in the common good. The welfare of the public is the paramount issue. These rights are given and regulated to protect the people generally and to insure an opportunity for all individuals, and each community, to grow and develop and assure its inhabitants the most complete and abundant life possible, commensurate with equal privileges for all others."

There is vast difference between this case and the one at bar concerning the matters on which findings were made and on which the Court apparently satisfied itself there was substantial evidence. Here there is no finding concerning the equipment which will be dedicated to the intended service and all equipment referred to is clearly shown by the record to have been dedicated to other service.

Here there is no finding that Salt Lake Transportation Service "would meet the demands of the public more adequately" than existing service.

Here there is no finding that the areas sought to be certificated are "without bus service," or "in need of bus service."

Here there is no finding as to any tendency on the part of the proposed service to "development of new homes and new enterprises," or contribute in any way to the economy.

The Commission has failed to make the findings essential to sustain its granting of a certificate of convenience and necessity and its order must be set aside.

POINT II

THE EVIDENCE DOES NOT SUPPORT THE COMMISSION'S FINDINGS THAT THERE IS A PUBLIC NEED FOR ADDITIONAL TOUR AND CHARTER SERVICE AND THAT OTHER CARRIERS PRESENTLY CERTIFICATED CANNOT PERFORM THE SERVICE IF REQUIRED AND THAT PUBLIC CONVENIENCE AND NECESSITY REQUIRES THE GRANTING OF A CERTIFICATE OF CONVENIENCE AND NECESSITY TO AN ADDITIONAL CARRIER.

Salt Lake Transportation failed to present any evidence concerning a need of the general public for tour or charter service originating and returning to and from points along Continental's certificated origin and return points. These points are on U.S. Highway 91 in Salt Lake City and south and between Provo and Deer Creek Damsite; along U. S. Highway 40 west in Salt Lake and west to the Utah-Nevada line and from the Utah-Wyoming state line on the north to the Utah-Arizona state line on the south on U. S. Highway 91. These points are also along U. S. Highway 40 in Salt Lake City and to the Utah-Colorado state line and on U. S. Highway 91 between Salt Lake City and Provo and from U. S. Highway 189 between Provo and Heber City or from U. S.

Highway 52 from Orem to the junction of U. S. Highway 189 and from Heber to the Utah-Colorado state line over U. S. Highway 40. Continental generally holds the authority to serve charter round trips originating on all routes served in its regular common carrier operation, restricted only against transportation service for tours on any regular schedule or regular route and trips wholly within municipal corporate limits served by urban transportation companies (R. 622-623).

The Record is also devoid of any testimony or evidence indicating that Continental had failed or refused to perform service requested of it. As a matter of fact Salt Lake Transportation witnesses, without exception, testified either that they were unaware Continental could perform these services, Gertrude Howard (R. 241); Lee Bronson (R. 324, 328), or that they would have no objection if Continental or another carrier performed the service, Howard (R. 241, 244); Bronson (R. 324).

Under these circumstances it is apparent Salt Lake Transportation has failed to present evidence upon which the Commission could base a finding as to need for the required service. The prior certification of a carrier in a particular area, as is the case of Continental here, carries with it considerable weight as a matter of law and burdens the applicant to a degree of proof which shows that existing carriers cannot or will not perform the required service.

This court in *Utah Light & Traction Co. v. Public Service Commission, et al.*, supra, at Page 690 of the Pacific Reporter said:

“ . . . That existing carriers engaged in transportation to and from a certain field or territory, rendering the service it is permitted or ordered to do, reasonably, adequately and efficiently, is not lightly or ruthlessly to be interfered with, or subjected to needless competition, is evident from the provisions of the statute.

* * * *

“An applicant desiring to enter a new territory, or to enlarge the nature or type of the service he is permitted to render must therefore show that from the standpoint of public convenience and necessity there is need for such service; that the existing service is not adequate and convenient, and that his operation would eliminate such inadequacy and inconvenience. . . .’”

The court also said, at Page 690:

“ . . . when a territory is satisfactorily serviced, and its transportation facilities are ample, a duplication of such service which unfairly interferes with the existing carriers may undermine and weaken the transportation setup generally and thus deprive the public of an efficient permanent service. True, existing carriers benefit from the restricted competition, but this is merely incidental in the solution of the problem of securing adequate and permanent service. . . .”

And in *Salt Lake Transfer Company vs. Public Service Commission of Utah, et al.*, 11 Utah 2d 121, 355 P.2d 706, 710 (1960):

“A search of the record reveals nothing upon which to base the conclusion that the addition of Barton’s services will in any way add to public convenience and necessity with regard to explo-

sives. As the record now stands, Ashworth and Salt Lake Transfer are rendering an adequate service in the transportation of explosives. Before additional service is authorized by the Commission, the applicant must show that the existing service is not adequate and convenient and that his proposed operation would eliminate the inadequacy and inconvenience."

And in *Lake Shore Motor Coach Lines, Inc. v. Welling, et al.*, 9 Utah 2d 114, 339 P.2d 1011, 1014 (1959):

"The Commission is charged with the responsibility of over-all planning so that the public will be furnished with the most frequent, economical and convenient service possible, not only presently, but in the long run. This involves consideration of all of the pertinent factors bearing upon the advisability of authorizing additional service: it includes protection of existing carriers whose services may become impaired or even destroyed by permitting competition, the potential of business, the ability, financial and otherwise, of the applicant to render the proposed service, and the burdening of the highways. The Commission must weigh all of such matters in determining whether public convenience and necessity require the proposed service. . . ."

In *Lake Shore Motor Coach Lines, Inc. v. Bennett, et al.*, 8 Utah 2d 293, 333 P.2d 1061 (1958), the Court set aside an order of the Commission granting an increase to a common carrier on the grounds that there was no support in the record for a finding that public convenience and necessity required the additional service, and that its effect would be to impair transportation service by undermining the economic well being of the

services then in operation. Speaking generally of the principles underlying regulation of utilities, the court said, commencing at Page 1062, of the Pacific Reporter:

“It is well to have in mind the principles underlying the regulation of common carriers by the Public Service Commission. Generally speaking, competition is a good thing because it tends to control excesses and abuses, and to produce the best goods and services at the lowest prices. It thus serves as a vital and stimulating force in our economic and industrial life and is sometimes said to be the life of commerce. An exception to this generality exists in services providing gas, telephone, electricity, transportation and certain others where competition would result in duplication of expensive facilities which the public would have to pay for in the long run and thus be inimical to its interest. In order to eliminate such waste full duplication of facilities and services, businesses of that type are granted monopoly franchises. As a condition to such privilege, the utilities are obliged to submit to regulation by public authority, which takes the place of the controls usually enforced by competition. . . . When a carrier applies to institute a new carrying service, the Commission must take into account, not only the immediate advantage to some members of the public in increased service, and to the applying carrier in permitting him to enlarge the scope of his business, but must plan long-range for the protection and conservation of carrier service so that there will be economic stability and continuity of service. This obviously cannot be done unless existing carriers have a reasonable degree of protection in the operations they are maintaining.

* * * *

“Proving that public convenience and necessity would be served by granting additional carrier authority means something more than showing the mere generality that some members of the public would like and on occasion use such type of transportation service. In any populous area it is easy enough to procure witnesses who will say that they would like to see more frequent and cheaper service. That alone does not prove that public convenience and necessity so require. Our understanding of the statute is that there should be a showing that existing services are in some measure inadequate, or that public need as to the potential of business is such that there is some reasonable basis in the evidence to believe that public convenience and necessity justify the additional proposed service.”

Speaking of the applicant's witnesses the court continued, at Page 1064:

“. . . It is obvious, as they without exception admitted, that their self-interest would be served by having more carriers with more frequent schedules. In short, the speediest and cheapest transportation possible, which purpose an additional carrier would tend to serve. In other words, from their point of view, the more carriers the better. This is quite understandable because they were in no way concerned with the long-range planning hereinabove referred to, nor with keeping existing carriers solvent and in operation.”

In a concurring opinion Justice Henriod stated, at Page 1065:

“Existing carriers that have expended risk capital, and have complied with tariff and other Commission requirements, ordinarily are entitled

to protection against competition until a proposed competitor or someone else establishes by substantial evidence a failure to perform the service which the Commission has authorized and ordered them to perform."

The language in this case squares on all fours with the Record.

In the instant proceeding, as the court states, "In any populous area, it is easy enough to get witnesses who will say they would like to see more frequent and cheaper service." No witness testified on behalf of Salt Lake Transportation who said any more than that. It is obviously to the interest of those persons involved in tourist and publicity work, in chamber of commerce work, in recreational work, to press for added services which they can publicize for their own self-serving interest. If that is all that is required in a case of public convenience and necessity, the Public Service Commission has indeed lost its statutory jurisdiction and authority to the tourism council or various chamber of commerce groups throughout the state.

Salt Lake Transportation not only has failed to meet its burden in showing existing carriers cannot perform or are unwilling to perform or are incapable of performing the service for which it applied and to introduce with any particularity evidence on which the Commission could base a finding as to any need, but it blatantly and categorically stated that its application was competitive with service being rendered by Continental. Mr. Boynton was asked:

“Q. And you want to compete with them on the charter business?

“A. We want to compete with the Continentals, yes, sir.” (R. 276).

This is a tacit acknowledgment on the part of Salt Lake Transportation that its service is not unusual or something that isn't being presently offered to the public but that it intends to expand existing authority to be completely competitive with services already being offered by carriers presently holding certificates of convenience and necessity from the Commission.

Another serious question presents itself here with respect to the investment made by Continental and other carriers. Continental bases 25 buses in Utah and as of December 31, 1965 had a Utah investment of \$3,794,230.00 (R. 510, 596). Salt Lake Transportation, on the other hand, would be using equipment already dedicated to other services (R. 287) or leasing equipment (R. 332) to perform the competitive service. The Commission has arbitrarily refused to consider evidence as to expenditures of existing carriers and the consequential duplication and waste. Its findings cannot be supported.

The Order of the Commission must be set aside for the reason that Salt Lake Transportation has not sustained its burden of proof so as to enable the Commission to find there is a public need for its service or that existing carriers are unable, or unwilling to perform the services in question.

POINT III

THE COMMISSION'S ORDER IS UNLAWFUL, ARBITRARY AND CAPRICIOUS IN THAT THE COMMISSION REFUSED TO RECOGNIZE AND TAKE INTO ACCOUNT UNCONTRADICTED EVIDENCE OF DAMAGE TO EXISTING CARRIERS AND THEIR SERVICE BROUGHT ABOUT BY THE GRANTING OF THE APPLICATION.

Mr. Serge L. Campbell of Continental testified with respect to Exhibits 40 through 54 (R. 584-599c). These generally show the Continental system income and its equipment and investment in the State of Utah, which is considerable.

Continental bases 25 buses in Utah (R. 510); in 1965 had revenues of \$3,794,230.07 (R. 596); and had a Utah payroll of \$525,480.43 (R. 597).

Of significance are schedules of net operating revenues and operating ratios in Utah. For the year 1961 the net operating revenue was \$135,445.35, with an operating ratio of 87.4% and bus miles operated of 2,464,885 (R. 585). For the year 1962 the net operating revenue was \$90,346.83, operating ratio 92.4%, bus miles operated of 2,634,223 (R. 587). For the year 1963 the net operating revenue was \$40,159.05, with an operating ratio of 96.5% and bus miles operated of 2,509,393 (R. 589). For the year 1964 the net operating revenue was \$66,671.53, with an operating ratio of 94.7% and bus miles operated of 2,498,035 (R. 591). For the year 1965 the net operating revenue was \$16,294.61, with an operating ratio of 98.7% and bus miles operated of 2,574,228 (R. 593).

It can be readily seen that in 1965 Continental had Special Bus Revenues, which include charter and tour services, of \$68,175.91. It derived at year end a net operating revenue of \$16,294.61. The comparison of these figures can lead to no other conclusion than the charter services performed by Continental are of extreme importance to it. Mr. Campbell testified that \$8,327 total revenue was directly attributable to Utah charters in the year 1965 (R. 513). This is approximately 50% of the net profit Continental made in the State of Utah in 1965, although obviously some expenses would be deducted from the gross revenue figures.

Mr. Campbell testified that the operating ratios show:

“A. Well, they show that from year to year our operating revenue is climbing all the time and our profits are becoming less for operating the same amount.” (R. 503).

He further testified:

“Q. And Exhibit 54 is a statement of the interstate charters operated in Utah during 1965?”

“A. Yes, sir.

“Q. At any time during 1965, Mr. Campbell, did your companies have to turn down a charter?”

“A. No, sir, we did not. We had equipment available at all times.” (R. 504)

The interest of Continental in this proceeding relates to charter operations (R. 516). Revenues lost because of Salt Lake Transportation certifications will affect and damage Continental.

The evidence completely contradicts the Commission's purported findings, that existing carriers would not be detrimentally affected by the granting of the application and the Order should be set aside.

CONCLUSION

The Commission has failed to make Findings on essential elements to a case of public convenience and necessity and the Commission is without the ability to base Findings of a Certificate of Convenience and Necessity on evidence that has been presented.

The Order of the Commission is, therefore, arbitrary, capricious, and unlawful and must be vacated, annulled, and set aside.

Respectfully submitted,
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